

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

v.

TONY LEONG,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES

JURISDICTION

This is a government appeal from an order of the district court (Williams, D.J.) suppressing a confession in a criminal case. The district court, which had jurisdiction under 18 U.S.C. 3231, entered the suppression order on October 18, 1996. Joint Appendix (J.A.) 31-34. The government timely filed a notice of appeal on November 14, 1996. J.A. 36. This Court has jurisdiction under 18 U.S.C. 3731.

QUESTION PRESENTED

Whether 18 U.S.C. 3501 renders Leong's unwarned statement admissible in the government's case in chief at trial, even though

this Court has held that Miranda v. Arizona, 384 U.S. 436 (1966), requires suppression of the statement.

STATEMENT OF THE CASE

On July 15, 1996, appellee Tony Leong was indicted in the United States District Court for the District of Maryland on one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g). Leong moved prior to trial to suppress a statement he made admitting ownership of the firearm, claiming that the statement was taken in violation of Miranda v. Arizona, 384 U.S. 436 (1966). Following a hearing, the district court ordered suppression of the statement, finding that Leong had been in custody at the time he made it, and that he had not been advised of his rights as required by Miranda.

The government appealed, and this Court heard oral argument on May 5, 1997. On June 26, 1997, the Court issued an unpublished, per curiam decision affirming the district court's suppression order. The government did not petition for rehearing or file a suggestion for rehearing en banc. On July 16, 1997, however, the Court sua sponte issued an order directing both the United States and Leong to file supplemental briefs addressing the impact of 18 U.S.C. 3501 on the admissibility of Leong's confession.

STATEMENT OF FACTS

1. At about 3 a.m. on June 1, 1996, Officer Nichols of the United States Park Police observed a vehicle speeding on Maryland

Route 197. Nichols pulled the vehicle over in a dark, wooded, and fairly isolated area. After asking for the driver's license and registration, Nichols issued the driver a warning citation for speeding. Leong was one of three passengers in the vehicle, in addition to the driver; he was seated in the left rear passenger seat.

While speaking with the driver, Nichols noticed an odor of alcohol emanating from the vehicle. Nichols asked the driver if he had consumed any alcohol and whether there was alcohol in the vehicle. The driver responded to both questions in the negative, but stated that some of his passengers might have been drinking earlier. Nichols then ascertained that all of the vehicle's occupants were under 21 years of age. Nichols asked if he could search the vehicle and the driver consented. All four passengers exited the vehicle and walked to its rear at Nichols' request. None of the passengers was handcuffed, guarded, or told he was under arrest.

During the ensuing search, Nichols discovered a handgun in a plastic holster on the floor behind the driver's seat. Nichols picked up the firearm, and walked to the rear of the car, where he told all four passengers to squat and put their hands above their heads. Nichols asked, "Whose gun is this?," but received no response. After a few moments, the driver became a bit distraught and also said, "Come on, whose is it?" Nichols then told the group, "if someone doesn't -- if I can't find out who this gun

belongs to, I'm just going to have to assume it's one -- it could be any of you and you're all going to be placed under arrest, you know, till I figure this out." J.A. 13. After Nichols again asked who owned the gun, Leong admitted that the gun was his. Nichols then placed Leong in handcuffs.

2. Leong filed a motion to suppress his admission on the ground that he made the statement in response to custodial interrogation by Nichols, and that he had not received the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966). The government opposed the suppression motion solely on the ground that Miranda warnings were not required because Leong was not in custody when he admitted owning the gun. Following a hearing at which only Officer Nichols testified, the district court determined that Leong was in custody when Nichols asked the group who owned the gun, and that Miranda required the suppression of his unwarned statement.

3. Following briefing and oral argument, this Court issued an unpublished per curiam opinion affirming the suppression order. United States v. Leong, 116 F.3d 1474, 1997 WL 351214 (4th Cir. June 26, 1997). The Court determined that the only "issue for review is whether Leong was 'in custody' for purposes of Miranda; if so, his admission was properly suppressed by the district court." 1997 WL 351214, at *2. On that point, the Court held that the routine traffic stop evolved into custodial interrogation within the meaning of Miranda "when Leong was subjected to questioning by Nichols after being told that he and the others were

going to be placed under arrest until Nichols found out who owned the firearm." Id. at *4. Under those circumstances, the Court reasoned, a reasonable person would have believed he was not free to leave and that he was in custody. Ibid. Because Miranda warnings were not administered, the Court held that the suppression of Leong's statement was proper. Ibid.

4. The government did not petition for rehearing or file a suggestion for rehearing en banc of the Court's decision within the 14-day period prescribed by Rules 35(c) and 40 of the Federal Rules of Appellate Procedure. Instead, on July 14, 1997, the United States moved in the district court to dismiss the indictment against Leong, and a dismissal order was entered on July 16, 1997.¹

Also on July 16, however, this Court issued an order

direct[ing] the parties to submit supplemental briefs addressing the effect of 18 U.S.C.A. Sec. 3501 on the admissibility of Leong's confession, including the effect of the statute on Miranda v. Arizona, 384 U.S. 436 (1966), and any constitutional issues arising therefrom.

¹ We do not believe that the dismissal of the indictment necessarily renders moot the supplemental question concerning the impact of Section 3501. This Court had not issued its mandate on July 16, and therefore the district court may have lacked jurisdiction to dismiss the indictment. See United States v. Rodgers, 101 F.3d 247, 251 (2d Cir. 1996) (in general, "[a] district court does not regain jurisdiction until the issuance of the mandate by the clerk of the court of appeals"). In any event, as far as we are aware, there would be no legal bar to re-indicting Leong within the statute of limitations if this Court were to reverse its decision suppressing his confession. See United States v. Cefaratti, 202 F.2d 13, 14 (D.C. Cir. 1952) (holding that government appeal from order suppressing evidence was not moot despite dismissal of relevant counts of indictment where government planned to re-indict if suppression order were reversed), cert. denied, 345 U.S. 907 (1953).

This brief addresses those issues.²

SUMMARY OF ARGUMENT

In enacting 18 U.S.C. 3501, Congress attempted to secure the admissibility in federal courts of statements that would otherwise be suppressed under the Supreme Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966). The Supreme Court has recently emphasized, however, that Congress has no power to overrule its interpretations of the Constitution. City of Boerne v. Flores, 117 S. Ct. 2157, 2163-2164 (1997). Thus, if Miranda represents the Supreme Court's interpretation of the Constitution, Section 3501 is invalid.

Both Miranda itself, and the Court's continued application of Miranda in cases arising in state courts, suggest that the Court views Miranda as based on the requirements of the Constitution. In other decisions, however, the Court has stated that the particular warnings set out in Miranda are not themselves required by the Constitution, but are merely "prophylactic" rules. These cases may be in tension, but it is ultimately the Supreme Court that will have to reconcile them. Just this Term, the Court reiterated that the lower federal courts cannot assume that controlling decisions

² We note that the government did not invoke 18 U.S.C. 3501 in this case and that the district court therefore did not consider its bearing on the admissibility of Leong's statement. If this Court were to hold that Section 3501(a) is constitutional and that it supersedes Miranda, we believe it would be appropriate to remand the case to allow the district court to make a determination of voluntariness in the first instance.

of the Court have been overruled sub silentio, but must follow those decisions until the Court itself overrules them. Agostini v. Felton, 117 S. Ct. 1997, 2017 (1997).

The inescapable conclusion from the Court's most recent jurisprudence, therefore, is that it would not be appropriate for the lower courts, including this Court, to apply Section 3501 to admit a defendant's statement in a case in which Miranda would require its suppression, or for the Department of Justice to urge the lower courts to do so. Should the issue of Section 3501's validity or the constitutional status of Miranda be presented to the Supreme Court, however, the same considerations would not control, since the Supreme Court (unlike the lower courts) is free to reconsider its prior decisions, and the Department of Justice is free to urge it to do so.

ARGUMENT

THIS COURT IS NOT FREE TO APPLY 18 U.S.C. 3501 TO ADMIT EVIDENCE THAT WOULD BE EXCLUDED UNDER MIRANDA V. ARIZONA, BECAUSE MIRANDA IS THE SUPREME COURT'S CONTROLLING AUTHORITY ON THE ADMISSIBILITY OF STATEMENTS MADE IN CUSTODIAL INTERROGATION.

A. Miranda v. Arizona.

The Self-Incrimination Clause of the Fifth Amendment guarantees that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const., Amend. V. The constitutional privilege against compelled self-incrimination "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a

testimonial or communicative nature." Schmerber v. California, 384 U.S. 757, 761 (1966). The "privilege is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will." Id. at 763 (internal quotation marks omitted). See also Pennsylvania v. Muniz, 496 U.S. 582, 596 (1990) ("[a]t its core, the privilege reflects our fierce unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt") (internal quotation marks omitted); Kastigar v. United States, 406 U.S. 441, 445 (1972) (Supreme Court "has been zealous to safeguard the values that underlie the privilege").

Until Miranda was decided in 1966, the Supreme Court generally analyzed the admissibility of confessions "as a question of due process." Withrow v. Williams, 507 U.S. 680, 688 (1993). See Oregon v. Elstad, 470 U.S. 298, 304 (1985) (admissibility of statements "judged solely" by voluntariness under Due Process Clause before Miranda). Under that approach, the Court examined the totality of the circumstances "to determine whether a confession had been made freely, voluntarily and without compulsion or inducement of any sort." Withrow, 507 U.S. at 689 (internal quotation marks omitted). That inquiry typically focused on such factors as the length and continuity of the interrogation, its location, the presence of police coercion, the defendant's maturity, education, and mental and physical condition, and whether the defendant was advised of his rights to remain silent and to

have counsel present during custodial interrogation. Id. at 693-694.

In Miranda v. Arizona, 384 U.S. 436 (1966), however, the Supreme Court announced a new analytical approach under the Self-Incrimination Clause to cases involving custodial interrogation. Miranda held categorically that no statements stemming from custodial interrogation of a suspect would be admissible at trial unless the police first provided the suspect with a set of four specific "warnings."³ Id. at 444. After canvassing contemporary interrogation procedures, the Court concluded that such safeguards were necessary because custodial interrogation is inherently coercive; thus, "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." Id. at 458; see id. at 467 ("without proper safeguards the process of in-custody interrogation * * * contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely").

The Miranda Court acknowledged that the Constitution required no "particular solution for the inherent compulsions of the

³ The Court held that, prior to any questioning, suspects in custody must be told (1) that they have the right to remain silent; (2) that any statements they make can be used against them; (3) that they have the right to the presence of an attorney during questioning; and (4) that an attorney will be appointed for them if they cannot afford one. Miranda, 384 U.S. at 444.

interrogation process" (384 U.S. at 467), and it expressly left open the possibility that Congress and the States might "develop their own safeguards for the privilege, so long as they are fully as effective as [the warnings] in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it." Id. at 490. The Court held, however, that unless equally effective alternative procedures were adopted, the warning "safeguards must be observed." Id. at 467.

The Miranda Court concluded by reversing the convictions in all four of the consolidated cases before it -- three of which arose in state courts. In each case, local law enforcement officers had either failed to advise, or had incompletely advised, the suspects of their rights prior to questioning. See Miranda, 384 U.S. at 491-499. Under the rule adopted in Miranda, those deficiencies required reversal, despite the Supreme Court's express acknowledgement that it "might not find the defendants' statements to have been involuntary in traditional terms." Id. at 457.

B. 18 U.S.C. 3501.

Two years after Miranda was decided, Congress enacted 18 U.S.C. 3501.⁴ Section 3501(a) provides that "in any criminal prosecution brought by the United States," a confession "shall be admissible in evidence if it is voluntarily given." The statute requires trial judges to make a threshold determination of

⁴ The full text of Section 3501 is set forth in an Addendum to this brief.

voluntariness outside the presence of the jury (18 U.S.C. 3501(a)), and provides that voluntariness shall be assessed based on the totality of the circumstances -- including whether or not the "defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him," and whether the defendant had been advised of his right to counsel (18 U.S.C. 3501(b)). Section 3501(b) expressly states, however, that the "presence or absence" of any particular factor "need not be conclusive on the issue of voluntariness of the confession."

Congress clearly intended that Section 3501 would supersede Miranda. Miranda held unqualifiedly that any statements made during custodial interrogation and not preceded by the requisite warnings would be inadmissible at the suspect's trial. Section 3501, by contrast, makes voluntariness the sole prerequisite to admissibility, and deems any warnings simply one of several non-exclusive factors to be considered in determining voluntariness. By its terms, Section 3501 precludes suppression of an otherwise voluntary confession solely because of the lack of warnings, whereas Miranda requires such suppression.

The legislative history confirms Congress' intent to reject Miranda and to restore the traditional pre-Miranda voluntariness analysis. Criticizing Miranda as "an abrupt departure from precedent," the Senate Report explained that:

By the express provisions of the proposed legislation the trial judge must take into consideration all the surrounding circumstances in determining the issue of voluntariness,

including specifically enumerated factors which historically enter into such a determination. Whether or not the arrested person was informed of or knew his rights before questioning is but one of the factors. * * *

The committee feels that it is obvious from the opinion of Justice Harlan and other dissenting Justices * * * that the overwhelming weight of judicial opinion in this country is that the voluntariness test does not offend the Constitution or deprive a defendant of any constitutional right. No one can predict with any assurance what the Supreme Court might at some future date decide if these provisions are enacted. The committee has concluded that this approach to the balancing of the rights of society and the rights of the individual served us well over the years, that it is constitutional and that Congress should adopt it. After all, the Miranda decision itself was by a bare majority of one, and with increasing frequency the Supreme Court has reversed itself. The committee feels that by the time the issue of constitutionality would reach the Supreme Court, the probability rather is that this legislation would be upheld.

S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S. Code Cong. & Ad. News 2112, 2137-2138. Senate opponents also recognized that, by "mak[ing] voluntariness the sole criterion of the admissibility of a confession," Sections 3501(a) and (b) were "squarely in conflict with" Miranda. Id. at 2210-2211. Likewise, both the proponents and the opponents of Section 3501 in the House of Representatives recognized that the legislation rejected Miranda. See, e.g., 114 Cong. Rec. 16,066 (1968) (remarks of Rep. Celler); id. at 16,074 (Rep. Corman); id. at 16,278 (Rep. Poff); id. at 16,279 (Rep. Taylor); id. at 16,296 (Rep. Randall); id. at 16,297-16,298 (Rep. Pollock).

C. Analysis.

There is no question that Congress has the power to supersede judicially created rules that are not themselves required by the

Constitution. Cf. Palermo v. United States, 360 U.S. 343, 353 n.11 (1959) (upholding federal statute establishing more narrow disclosure of "Jencks" materials than prior Court-created rule because statute transgresses no "constitutional barrier" and the "power of this Court to prescribe rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress"). Congress does not, however, have the power to alter the substance of the Supreme Court's constitutional interpretations by legislation. See City of Boerne v. Flores, 117 S. Ct. 2157, 2163-2164 (1997) (invalidating Religious Freedom Restoration Act). The validity of Sections 3501(a) and (b) therefore depends on whether Miranda implements constitutional requirements or is an exercise of the Supreme Court's supervisory powers. Miranda's holding, and the holdings in several subsequent cases, depend on the conclusion that Miranda is constitutionally based. While there is tension within the Supreme Court's post-Miranda jurisprudence, in the absence of an express Supreme Court holding overturning Miranda and its progeny, this Court is not free to apply Section 3501 to admit evidence that Miranda would exclude. See Agostini v. Felton, 117 S. Ct. 1997, 2017 (1997) ("if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions") (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S.

477, 484 (1989)).⁵

The Miranda Court clearly based its holding on the Constitution. Miranda held that "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." 384 U.S. at 458. This was so because the "process of in-custody interrogation," as the Court understood it, "contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." Id. at 467. Thus, the Miranda Court concluded that a suspect's Fifth Amendment privilege against compelled self-incrimination is always violated unless police officers take effective measures to dispel the compulsion attendant to custodial interrogation.

⁵ Although statutes must be construed if possible to avoid difficult questions of their constitutionality, "[t]hat course is appropriate only when the statute provides a fair alternative" to the unconstitutional construction. Lewis v. United States, 445 U.S. 55, 65 (1980). In this case, "[w]ith the face of the statute and the legislative history so clear" (ibid.), we discern no plausible alternative construction that does not yield an unavoidable conflict with the dictates of Miranda.

For example, Congress cannot be deemed to have taken advantage of Miranda's invitation to devise an "alternative[] for protecting the privilege" that is "at least as effective [as the warnings] in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." Miranda, 384 U.S. at 467. Sections 3501(a) and (b) do not require that suspects be informed of their rights; instead, Congress simply relegated warnings back to their pre-Miranda status as but one factor in the ultimate standard of voluntariness.

The Supreme Court, however, has since retreated from that aspect of its reasoning in Miranda. In a line of cases beginning with Michigan v. Tucker, 417 U.S. 433 (1974), the Court has held that a violation of Miranda's rules is not per se a constitutional violation; that is, a statement is not necessarily "compelled" in violation of the Fifth Amendment privilege against self-incrimination simply because it was unwarned. In Tucker, a suspect who had received incomplete Miranda warnings (in interrogation before the Miranda decision itself) gave a statement naming a witness who later incriminated the suspect at trial. The Court held that suppression of the witness' testimony was not required under the "fruit of the poisonous tree" doctrine, because the police conduct at issue "involved no compulsion sufficient to breach the right against compulsory self-incrimination[,] * * * but departed only from the prophylactic standards later laid down by this Court in Miranda to safeguard that privilege." 417 U.S. at 445-446. Citing Miranda's statement that the Constitution does not "necessarily require[] adherence to any particular solution for the inherent compulsions of the interrogation process," Tucker concluded that:

[Miranda] recognized that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected. * * * The suggested safeguards were not intended to "create a constitutional straitjacket," but rather to provide practical reinforcement for the right against compulsory self-incrimination.

Id. at 444 (quoting Miranda, 384 U.S. at 467).

Since Tucker, the Supreme Court has frequently stated that the Miranda rules are "prophylactic" and that an unwarned statement is not necessarily "compelled" in violation of the Fifth Amendment. See, e.g., Davis v. United States, 512 U.S. 452, 457 (1994); Duckworth v. Eagan, 492 U.S. 195, 203 (1989); Connecticut v. Barrett, 479 U.S. 523, 528 (1987). In Oregon v. Elstad, 470 U.S. 298 (1985), for example, the Court again declined to suppress the fruits of an unwarned statement. In that case, the suspect incriminated himself before receiving Miranda warnings, but then subsequently received the warnings, fully waived his rights, and signed a confession. The Court emphasized that the "fruit of the poisonous tree" doctrine "assumes the existence of a constitutional violation," (id. at 305), and that, unlike the Fourth Amendment exclusionary rule, which is triggered by an actual constitutional violation,

[t]he Miranda exclusionary rule * * * sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation. The Fifth Amendment prohibits use by the prosecution in its case in chief only of compelled testimony. * * * Miranda's preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm.

But the Miranda presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted. Despite the fact that patently voluntary statements taken in violation of Miranda must be excluded from the prosecution's case, the presumption of coercion does not bar their use for impeachment purposes on cross-examination.

Id. at 306-307 (footnote and citations omitted; emphasis in

original). Thus, while the Court reaffirmed Miranda's command that the initial unwarned statement must be suppressed, it held that "in situations that fall outside the sweep of the Miranda presumption" (id. at 307), the admissibility of a statement "should turn * * * solely on whether it is knowingly and voluntarily made." Id. at 309.

The Court also expressed the view that an unwarned statement is not necessarily an unconstitutionally "compelled" statement in New York v. Quarles, 467 U.S. 649 (1984). There, the Court recognized a "public safety" exception to the requirement of Miranda warnings, holding that on balance, "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." Id. at 657. Like Tucker, Quarles rejected the premise "that the statement must be presumed compelled because of" the failure to deliver Miranda warnings. Id. at 655 n.5 (emphasis in original). The Court found that "the doctrinal underpinnings of Miranda [do not] require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety," for Miranda was based largely on the Court's view that warnings "would reduce the likelihood that the suspects would fall victim to constitutionally impermissible practices of police interrogation." Id. at 656 (emphasis added).

Viewed in isolation, the foregoing line of authority can be

argued to support the validity of Section 3501, for those cases state that violations of Miranda's rules do not necessarily result in statements that must be deemed "compelled" within the meaning of the Self-Incrimination Clause.⁶ Tucker and its progeny therefore might be read to suggest that the Court's formulation of the Miranda rules, and its associated suppression remedy, was simply an exercise of the Court's supervisory powers -- which would permit Congress to supersede Miranda by providing an alternative rule governing the admissibility of confessions. We note, however, that the Tucker Court expressly quoted Miranda's statement that "the prosecution may not use statements * * * stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Tucker, 417 U.S. at 443 (quoting Miranda, 384 U.S. at 444) (emphasis added). Of course, the Miranda Court had no authority to limit the circumstances under which Congress or the States could deviate from the warnings requirement unless Miranda itself was constitutionally grounded. Thus, Tucker's adherence to

⁶ The only court of appeals that has expressly considered the impact of Tucker on the validity of Section 3501 reached that conclusion. In United States v. Crocker, 510 F.2d 1129 (10th Cir. 1975), the Tenth Circuit concluded without extended analysis that, "although not involving the provisions of § 3501, [Tucker] did, in effect, adopt and uphold the constitutionality of the provisions thereof." Id. at 1137. Crocker was decided less than a year after Tucker, however, and as far as we are aware, the Tenth Circuit has not had occasion to reexamine Crocker in light of subsequent developments in the Supreme Court's Miranda jurisprudence, which we discuss below.

this aspect of Miranda undercuts the argument that Tucker may be read to have entirely repudiated Miranda's constitutional underpinnings.

Moreover, despite the language of Tucker and other cases, we do not believe that the Supreme Court's jurisprudence permits this or any lower court to draw the conclusion that Miranda may now be viewed solely as an exercise of the Court's supervisory powers. The most important indication that the Court does not regard Miranda as resting simply on its supervisory powers is the fact that the Court has continued to apply the Miranda rules to cases arising in state courts. See, e.g., Stansbury v. California, 511 U.S. 318 (1994) (per curiam); Minnick v. Mississippi, 498 U.S. 146 (1990); Arizona v. Roberson, 486 U.S. 675 (1988); Michigan v. Jackson, 475 U.S. 625 (1986). Although the Court has the authority to announce rules of procedure and evidence binding on federal courts, it has -- both before and after Miranda -- consistently disclaimed any such supervisory authority over state courts. With respect to cases tried in state courts, the Court's "authority is limited to enforcing the commands of the United States Constitution." Mu'Min v. Virginia, 500 U.S. 415, 422 (1991). See Smith v. Phillips, 455 U.S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension."); McNabb v. United States, 318 U.S. 332, 340-341 (1943) (same). Because federal judges "may not require the observance of any

special procedures" in state courts "except when necessary to assure compliance with the dictates of the Federal Constitution" (Harris v. Rivera, 454 U.S. 339, 344-345 (1981) (per curiam)), the Court's continued application of Miranda's exclusionary rule in state cases depends upon the conclusion that Miranda rests on constitutional underpinnings.⁷

The Supreme Court has also recently held that claims that a conviction rests on statements obtained in violation of Miranda are cognizable on federal habeas review. Withrow v. Williams, 507 U.S. 680, 690-695 (1993). Habeas corpus is available only for claims that a person "is in custody in violation of the Constitution or the laws or treaties of the United States." 28 U.S.C. 2254(a). Because Miranda is not a "law" or a treaty, the Court's holding in Withrow depends -- as does its application of Miranda to the states -- on the conclusion that the requirement of Miranda warnings implements and protects constitutional rights.

Finally, there is recurrent language in the Supreme Court's cases suggesting that -- "[p]rophylactic" though [they] may be" (Withrow, 507 U.S. at 691) -- the Miranda rules, and subsequent extensions of the rules, nonetheless have constitutional footings. In Illinois v. Perkins, 496 U.S. 292, 296 (1990), for example, the

⁷ Indeed, both Tucker and Elstad were state cases, and in both decisions, the Supreme Court reaffirmed Miranda's basic command that an unwarned statement must be excluded from the government's case in chief. Tucker, 417 U.S. at 445; Elstad, 470 U.S. at 307.

Court characterized Miranda as having "held that the Fifth Amendment privilege against self-incrimination prohibits admitting statements given by a suspect during 'custodial interrogation' without a prior warning." See also Edwards v. Arizona, 451 U.S. 477, 481-482 (1981) (describing Miranda as having "determined that the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination required that custodial interrogation be preceded by advice" concerning the suspect's rights). In Moran v. Burbine, 475 U.S. 412, 427 (1986), the Court rejected a claim that Miranda required suspects to be informed that their attorneys were trying to contact them, and it described that holding as "our interpretation of the Federal Constitution." And in United States v. Havens, 446 U.S. 620, 626 (1980), the Court stated that allowing statements taken in violation of Miranda to be used for impeachment purposes permits the use of "unconstitutionally obtained evidence." See also Michigan v. Jackson, 475 U.S. 625, 629 (1986) ("The Fifth Amendment protection against compelled self-incrimination provides the right to counsel at custodial interrogations."); Michigan v. Mosley, 423 U.S. 96, 99 (1975) (certiorari granted to resolve "important constitutional question" whether interrogation concerning separate offense following invocation of rights violates Miranda); Oregon v. Hass, 420 U.S. 714, 715 (1975) (Court frames issue as whether statements taken after invocation of right to counsel and used to impeach are "inadmissible under the Fifth and Fourteenth Amendments").

Moreover, the Court's description of the Miranda rules as "prophylactic" does not require the conclusion that the rules are therefore extra-constitutional. The appellation may simply reflect the notion that Miranda, in the interest of avoiding constitutional violations, structured a regime that "'overprotects' the value at stake" (Duckworth v. Eagan, 492 U.S. at 209 (O'Connor, J., concurring)), and thus excludes some statements that are not "compelled" within the meaning of the Self-Incrimination Clause of the Fifth Amendment. That a "prophylactic" rule is not necessarily a non-constitutional rule is confirmed by the Supreme Court's descriptions of Edwards v. Arizona, 451 U.S. 477 (1981). Edwards held that a properly warned suspect who asks for counsel is not subject to further interrogation until counsel has been made available to him, unless he himself initiates further communication with the police. Edwards, 451 U.S. at 484-485. In subsequent cases, the Court has both characterized the Edwards rule as "a second layer of prophylaxis" to protect a suspect's right to counsel under Miranda (McNeil v. Wisconsin, 501 U.S. 171, 176 (1991)), and also unmistakably described Edwards as a constitutional decision.⁸ See Minnick v. Mississippi, 498 U.S. 146, 153 (1990) (describing Edwards as holding that police had violated "rights secured to the defendant by the Fifth and

⁸ The Court's holding in Withrow -- that claims of Miranda violations are cognizable on federal habeas review -- also supports the conclusion that a rule may be both "prophylactic" and grounded in the Supreme Court's constitutional lawmaking authority.

Fourteenth Amendments"); Shea v. Louisiana, 470 U.S. 51, 52 (1985) (same); Oregon v. Bradshaw, 462 U.S. 1039, 1043 (1983) (opinion of Rehnquist, J.) (same); Michigan v. Jackson, 475 U.S. at 636 (Edwards "decision itself rested on the Fifth Amendment").

In summary, we believe that on the current state of the Supreme Court's Miranda jurisprudence, no lower court is free to conclude that the Miranda rules lack a constitutional foundation. Although the Court in Tucker and other cases held that a failure to give the specific warnings required by Miranda is not a per se Fifth Amendment violation, those cases did not address or explain why, if not constitutionally based, the Miranda rules would continue to apply to the States. Indeed, the Court's continued application of Miranda to the States and on habeas review simply cannot be explained on any ground other than that they were based on the Constitution. Thus, Tucker and its progeny can be read to have modified Miranda's understanding of what the Constitution requires, but not to have stripped Miranda of its constitutional basis entirely. Even though "prophylactic," Miranda cannot be explained -- given the current state of the Court's jurisprudence -- as anything other than a rule "necessary to assure compliance with the dictates of the Federal Constitution." Harris v. Rivera, 454 U.S. at 344-345. As such, it is a rule that Congress cannot supersede by legislation. See City of Boerne v. Flores, 117 S. Ct. 2157, 2163-2164 (1997).

Finally, even if Tucker and its progeny are viewed as having

eroded Miranda's basic constitutional premise, this Court may not disregard controlling Supreme Court precedent. Miranda has never expressly been overruled, and it is the Supreme Court's sole province to pass on the continuing validity of its decisions. As the Court recently cautioned:

We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Agostini v. Felton, 117 S. Ct. 1997, 2017 (1997) (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989)). Under the foregoing principle, until the Supreme Court expressly overrules Miranda and the more recent cases reaffirming Miranda's application to the States, lower courts may not disregard its basic command.⁹ Thus, to the extent that Section 3501 would require courts to admit statements obtained in violation of Miranda, this Court is bound by Miranda.

The government also is not free to disregard Miranda's command

⁹ Consistent with this principle, in its court of appeals brief in Agostini v. Felton, the Department of Justice took the position that the Second Circuit was bound by the Supreme Court's earlier decision in Aguilar v. Felton, 473 U.S. 402 (1985), even though the Court's subsequent Establishment Clause jurisprudence suggested that Aguilar was no longer good law, and though several Justices had expressly indicated a willingness to overrule Aguilar. Although the Department reserved the right to ask the Supreme Court itself to overturn Aguilar, the Department argued that the Second Circuit remained bound by the holding of that case.

by urging this Court to rely on Section 3501. We recognize that the Executive's responsibility to "take Care that the Laws be faithfully executed" (U.S. Const., Art. II, § 3) requires the Department of Justice to defend Acts of Congress whenever reasonable arguments are available in support of their constitutionality. The Supreme Court, however, is the final authority on the scope and interpretation of constitutional provisions; and when, as here, the Court has announced a constitutional rule based on its authority to explicate the Constitution, the Executive cannot properly urge lower courts to disregard that rule in favor of a contrary rule established by Congress. On the current state of Supreme Court law, the Department of Justice cannot advocate to this Court that Section 3501 be applied to admit evidence that Miranda or other Supreme Court decisions would exclude.¹⁰

¹⁰ Pursuant to Section 21(c) of Pub. L. No. 96-132, 93 Stat. 1049-1050 (1979), as extended to the current fiscal year by Pub. L. No. 104-208, § 102, 110 Stat. 3009 (1996), we declare that the foregoing position of the Department of Justice regarding the constitutionality of Section 3501 constitutes the position of the executive branch of the United States in the lower courts.

CONCLUSION

For the foregoing reasons, 18 U.S.C. 3501 does not provide a basis for this Court to require the admission of Leong's unwarned statement in the government's case in chief.

Respectfully submitted.

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CERTIFICATE OF SERVICE

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